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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE EX REL. INTAKE WATER CO.,
Petitioner

v.

BOARD OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA and CECIL WEEDING, VIOLA HERAK, WILLIAM H. BERTSCHE, CHARLES L. HASH, GORDON G. HOLTE, LAND M. LINDBERGH and RICHARD SPALDING, in their capacities as the individual members thereof; DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA; LEO J. BERRY, DIRECTOR, DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION OF THE STATE OF MONTANA, and UTAH INTERNATIONAL, INC.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MONTANA

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QUESTIONS PRESENTED

1. Does the Yellowstone River Compact, which was approved by the signatory States of Montana, Wyoming and North Dakota and by the United States Congress, *require* Montana to recognize a priority of filing in Wyoming, even though the water which is the subject of that filing is to be used in Montana and was apportioned to Montana under the Compact, and Article XVIII of the Compact specifically provides that no signatory State shall be divested of jurisdiction of the water appropriated to that State?

2. In a case in which Petitioner has never received a hearing, did the Montana Supreme Court violate the Yellowstone River Compact by ruling that Montana officials acted legally and pursuant to the Compact when they effectively divested Petitioner of its senior priority of filing for the use of water in Montana by recognizing a prior competing filing in Wyoming, even though the competing filing, when accomplished in Montana, was subsequent in time to that of Petitioner?

PARTIES TO THE PROCEEDINGS *

The parties before the Supreme Court of the State of Montana were the same parties listed as Petitioner and Respondents on the cover of this Petition.

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* Petitioner Intake Water Co. reports, pursuant to Rule 28.1 of the Rules of this Court, that it has a parent and certain affiliates. Because of the large number of such entities, they are set forth in Appendix I (App. 104a) hereto.

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OPINIONS BELOW

The order of the District Court of the First Judicial District, in and for the County of Lewis and Clark, State of Montana, staying all proceedings in that court pending a ruling of the Federal District Court, dated December 15, 1975, is not reported but appears as Appendix A

(App. 1a) hereto. The opinion of the United States District Court for the District of Montana declining jurisdiction in this case but construing the Yellowstone River Compact, dated December 5, 1979, is reported at 484 F. Supp. 36 and appears as Appendix B (App. 3a) hereto. The order of the State District Court dissolving its stay, dated January 8, 1980, is not reported but appears as Appendix C (App. 23a) hereto. The opinion and order of the State District Court quashing and dismissing Petitioner Intake's Amended Affidavit and Application for Writ of Mandate, filed February 25, 1981, is not reported but appears as Appendix D (App. 25a) hereto. The judgment of the State District Court dismissing with prejudice any further mandamus proceedings by Petitioner Intake but without prejudice to any other remedy Intake might have, dated March 16, 1981, is not reported but appears as Appendix E (App. 47a) hereto.

The opinion of the Supreme Court of the State of Montana affirming the order of the State District Court, dated April 15, 1982, is reported at 645 P.2d 383 and appears as Appendix F (App. 49a) hereto. The order of the Supreme Court of the State of Montana denying Petitioner Intake's Petition for Rehearing, dated May 13, 1982, is not reported but appears as Appendix G (App. 59a) hereto.

JURISDICTION

The opinion and order of the Montana Supreme Court, from which certiorari is sought, was rendered on April 15, 1982 (App. 49a). A timely Petition for Rehearing was filed by Petitioner on April 23, 1982, and was denied on May 13, 1982 (App. 59a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Petitioner raised the issues involved here under the Yellowstone River Compact—and particularly the correct construction and application of Article XVIII of that Compact—at the very outset of this case, even before its

"Amended Affidavit and Application for Writ of Mandate" had been filed, and continued to raise and argue these issues through State and Federal trial courts, in its briefs to the Montana Supreme Court, and in its Petition for Rehearing to that court.[1]

RELEVANT STATUTE AND COMPACT

The Yellowstone River Compact, which was consented to by Congress on June 2, 1949, Public Law 83, 81st Cong., 1st Sess., and approved by the signatory States and then by Congress, Act of October 20, 1951, 63 Stat. 152, Public Law 231, Ch. 629,[2] and the relevant portions of the Montana Water Use Act of 1973, Title 89, Ch. 8, Revised Codes of Montana, 1947 (now Title 85, Ch. 2, Montana Code Annotated), are set forth as Appendix H (App. 61a) hereto.

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[1] *E.g.*, "Plaintiff and Relator's Memorandum in Opposition to Motions to Quash and Dismiss," filed May 29, 1975, at pp. 17, 39-41 (hereinafter "Intake's May 29, 1975, Memo"); "Plaintiff and Relator's Memorandum in Opposition to Motions to Quash and Dismiss Amended Affidavit for Writ of Mandate", filed April 4, 1980, at pp. 25, 48, 52-63 (hereinafter "Intake's April 4, 1980, Memo"); "Post Hearing Brief and Memorandum of Plaintiff and Relator, Intake Water Company", filed December 30, 1980, at pp. 10-12 (hereinafter "Intake's December 30, 1980, Brief and Memo"); "Initial Brief of Plaintiff, Relator and Appellant, Intake Water Company", filed in the Montana Supreme Court on September 25, 1981, at pp. 32-45, 63 (hereinafter "Intake's September 25, 1981, Initial Brief"); "Reply Brief of Plaintiff, Relator and Appellant, Intake Water Company", filed in the Montana Supreme Court on February 12, 1981, at pp. 37-46, 48 (hereinafter "Intake's February 12, 1981, Reply Brief"); Petitioner's "Intake's Petition for Rehearing", filed in the Montana Supreme Court on April 23, 1982, at pp. 13-20, 22 (hereinafter "Intake's April 23, 1982, Petition for Rehearing").

[2] The Compact is currently codified by Montana as Title 85, Chapter 2, Montana Code Annotated (Chaper 9, Title 89, Revised Codes of Montana, 1947, § 89-903).

STATEMENT OF FACTS

The Yellowstone River and its major tributaries rise in Wyoming, flow through Montana, and then join the Missouri River just inside the North Dakota border. Together, they form the Yellowstone River Basin. The Powder River, which begins in Wyoming and ends in Montana, is a tributary of the Yellowstone River and is located in the Yellowstone River Basin.

In 1949, Congress consented to the enactment of the Yellowstone River Compact between the States of Wyoming, Montana and North Dakota. The Compact was subsequently adopted by these three States and then approved by the United States Congress in 1951 (63 Stat. 152, Public Law 231, Ch. 629). The primary purpose of the Compact, according to its Preamble, is "to provide for an equitable division and apportionment" of the waters of the Yellowstone River Basin, and to "remove all causes of present and future controversy" between States and persons with respect to the River and its tributaries. The Compact apportions 58% of the Powder River waters to Montana, and 42% to Wyoming. Art. V(B)(4) (App. 66a).

On November 20, 1973, Respondent Utah International, Inc. ("Utah"), filed in Wyoming an application for a permit to appropriate surface water of the Powder River. The application specifically recited that it "pertain[ed] to the diversion in the State of Wyoming of presently unused and unappropriated water of the Powder River *allocated to the State of Montana for beneficial use in that state (Montana)* pursuant to Article V(B)(4)(a)" of the Compact (emphasis added).[3] In other words, Utah

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[3] "Amended Affidavit and Application for Writ of Mandate", dated and filed August 18, 1975, in the State District Court, at Ex. B, pp. 2, 7, 12 (hereinafter "Amended Affidavit").

The amount of water to be diverted and put to beneficial use in Montana was specified to be 80,375 acre feet ("A.F.") for industrial

intended to appropriate water apportioned and allocated to Montana under the Compact, divert and store the water in Wyoming, and then transport it to, and use it in, Montana.

Shortly after it filed in Wyoming, Utah made what purported to be a proper filing of copies of the same papers in Montana pursuant to Article VII(B) (App. 69a) of the Compact.[4] Utah was thereafter informed by

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use, 7,610 A.F. for irrigation and reclamation, 2,090 A.F. for municipal use, and 14,325 A.F. for recreation, fish and wildlife (*id.* at p. 11), for a total of 104,400 A.F.

[4] Petitioner has alleged throughout these proceedings that the papers filed by Utah in Montana were defective, no filing fee was paid at the time of filing as required by state law, and the papers were not returned as defective in order to have them corrected in a timely fashion as provided for in the governing statute. *E.g.*, Amended Affidavit, *supra* n. 3, at p. 5, Pars. VII, VIII; Intake's May 29, 1975, Memo, *supra* n. 1, at pp. 3, 5, 42-43; Intake's April 4, 1980, Memo, *supra* n. 1, at pp. 9, 64-66; Intake's December 30, 1980, Brief and Memo", *supra* n.1, at pp. 6-7, 13-14, 16-17; Intake's September 25, 1981, Initial Brief, *supra* n. 1, at 9; Intake's February 12, 1982, Reply Brief, *supra* n. 1, at pp. 23-27, 43; Intake's April 23, 1982, Petition for Rehearing, *supra* n. 1, at pp. 8, 10.

Respondents have virtually conceded as much. Utah's "Memorandum in Support of Utah International, Inc.'s Motions to Dismiss and to Quash", filed May 8, 1975, at p. 19 (hereinafter "Utah's May 8, 1975, Memo"); "Defendants and Respondents [sic] Memorandum in Support of Motions to Quash the Alternative Writ of Mandate and to Dismiss the Amended Affidavit for Writ of Mandate", filed June 30, 1980, at pp. 4, 5, 16-18 (hereinafter "Respondents' June 30, 1980, Memo"); "Brief of Defendant and Respondent, Utah International, Incorporated", filed June 30, 1980, at pp. 21-24, 33-41 (hereinafter "Utah's June 30, 1980, Brief"); "Defendants' and Respondents' Supplemental Memorandum in Support of Motions to Quash the Alternative Writ of Mandate and to Dismiss the Amended Affidavit for Writ of Mandate", filed December 10, 1980, at pp. 2, 5 (hereinafter "Respondents' December 10, 1980, Supplemental Memo"); "Brief of Respondent, Utah International, Incorporated", filed October 26, 1981, at pp. 5-6, 23-26, 28 (hereinafter "Utah's October 26, 1981, Brief"); "Brief of Defendants, Respondents and Respondents on Appeal, Board of Natural Resources and Conserva-

Montana water authorities that in order to perfect its filing, it had to apply for a permit under Montana law.[5] Although Utah replied that it did intend to apply for such a permit,[6] it was not until January 14, 1975, that Utah filed its application in Montana on that State's form with the prescribed filing fee.[7]

In the meantime, on September 27, 1974, Petitioner had filed applications for permits in Montana and Wyoming (with duplicate copies in both States), seeking to appropriate waters of the Powder River for diversion, storage and beneficial use in Montana and Wyoming, pursuant to the Yellowstone River Compact.[8] Because of the amount of water sought in the competing applications of Utah and Petitioner, the granting of permits to either party would preclude the granting of permits to

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tion of the State of Montana, et al.", filed December 18, 1981, at p. 11 (hereinafter "Respondents' December 18, 1981, Brief"); "State of Montana's Objection to Petition for Rehearing", filed April 30, 1982, at p. 7 (hereinafter "Montana's April 30, 1982, Objection"); Utah's "Objections to Petition for Rehearing", filed April 30, 1982, at pp. 5, 8 (hereinafter "Utah's April 30, 1982, Objections").

For example, Utah admitted that Montana water officials "did not actually return the Wyoming forms to Utah for correction * * *" (Utah's June 30, 1980, Brief, *supra*, at p. 24).

Since the Montana Supreme Court apparently treated Utah's papers as if they had been properly filed in Montana as a matter of State law (App. 51a-52a), these issues are not directly before this Court. However, they do provide background and perspective in regard to the way Petitioner has been treated vis-a-vis Utah throughout the proceedings below.

[5] Utah's May 8, 1975, Memo, *supra* n. 4, at App. B, D, F.

[6] Intake's April 4, 1980, Memo, *supra* n. 1, at Ex. 4.

[7] Amended Affidavit, *supra* n. 3, at pp. 6-7, Par. XI.

[8] *Id.* at pp. 5-6, Pars. IX, X, Ex. C, D. Intake sought 245,000 A.F. for industrial use, 35,000 A.F. for municipal use, 38,700 A.F. for irrigation purposes, and 245,700 A.F. for sediment storage (*id.* at Ex. C, p. 2; Ex. D, p. 1), for a total of 564,400 A.F.

the other.[9] Therefore, the correctness of priority dates in the filing of appropriate papers has always been the core issue in this lawsuit.

As outlined above, there are three dates that are central to a resolution of the priority issue: November 20, 1973, when Utah filed in Wyoming; September 27, 1974, the date on which Petitioner filed in both Montana and Wyoming; and January 14, 1975, when Utah formally filed in Montana.

Despite original doubts of Montana water officials about the meaning of the Compact,[10] they ultimately concluded that they were required by Article VII(C) to defer to Wyoming and look to Wyoming law in assigning a date of priority to Utah's application filed in Montana. As a result, instead of assigning Utah a priority date of January 14, 1975, which was junior to Petitioner's filing, Montana water officials gave a retroactive application to Utah's Montana filing using the Wyoming date (November 20, 1973), a date senior to the date of priority assigned Petitioner's filing.[11] Thus, if Utah is ultimately granted a permit on its application, Petitioner will be entirely excluded from its planned $35,700,000 project (an original estimate which has dramatically increased over time).

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[9] Respondents Board and Department's "Memorandum in Support of Motion to Quash and Dismiss the Amended Affidavit and Application for a Writ of Mandate," filed October 16, 1975, at p. 3 (hereinafter "Respondents' October 16, 1975, Memo").

[10] See Utah's May 8, 1975, Memo, *supra* n. 4, at App. C.; Respondent Department's "Memorandum in Support of Motion to Quash and Dismiss," filed May 7, 1975, at p. 4; Respondents' June 30, 1980, Memo, *supra* n. 4, at p. 17.

[11] *E.g.*, Amended Affidavit, *supra* n. 3, at pp. 8, 9-11, Pars. XV, XVIII; Respondents' December 18, 1981, Brief, *supra* n. 4, at pp. 1, 4, 17-18 ("The priority date of Utah's appropriation rights is determined by Wyoming, the situs of the water rights").

Petitioner brought suit in the Montana District Court for a Writ of Mandate, grounded upon an Affidavit (and, subsequently, an Amended Affidavit) which set forth the relevant facts. It was Petitioner's position that the Yellowstone River Compact, when properly interpreted in conjunction with Montana law, did *not* require Montana to defer to Wyoming in awarding priorities but rather provided that Montana would establish its own priority as to water apportioned to that State under the Compact. As already noted (*supra* n.1), Petitioner principally relied upon Article XVIII of the Compact, which provides:

> No sentence, phrase, or clause in this compact or in any provision thereof shall be construed or interpreted to divest any signatory state or any of the agencies or officers of such states of the jurisdiction of the water of each state as apportioned in this compact. [App. 72a.]

Petitioner argued that it was entitled to mandamus because, under the Compact, Montana officials had no discretion in assigning priority dates, but rather had a legal duty to recognize the "first in time, first in right" priority date of Petitioner in assigning a priority date to Utah's January 14, 1975 filing in Montana.

Respondents contended that Petitioner had adequate remedies at law, but then went on to argue the proper interpretation of the Compact. They maintained that Montana water officials had no alternative but to assign to Utah the priority date in Montana that it had been granted by Wyoming.[12]

Before the Montana District Court could rule, Utah filed a declaratory judgment action in the United States District Court for the District of Montana, urging its interpretation of the Compact and Montana law upon that

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[12] *E.g.*, "Memorandum in Support of Motion to Quash and Motion to Dismiss Filed on Behalf of Utah International, Incorporated," filed October 16, 1975, at p. 14 (hereinafter "Utah's October 16, 1975, Memo").

court. The State District Court proceedings were thereupon stayed (App. 1a). The Federal District Court first purported to take jurisdiction for the purpose of interpreting the Compact (App. 14a-15a). However, the court then decided that, because Montana law concerning the effect of the Compact upon the terms of the Montana Water Use Act (App. 73a) was unsettled, "this Court finds that it must abstain from the exercise of its jurisdiction in this case, and, further, that this cause should proceed in the courts of the State of Montana" (App. 21a).

The Federal District Court's comments about the Compact thus become relevant only to the extent that they may have influenced the later decision of the Montana Supreme Court, from which certiorari is sought. Those comments include some with which Petitioner would agree—namely, that "the drafters intended that the Compact not operate in derogation of the sovereignty of any signatory state" (App. 17a), that Article VII (B) contemplates "an operation of the joint sovereignty of the states involved" (*id.*), that "* * * the law of each sovereign is implicated in determining the issues surrounding a given appropriation" (*id.*), that after an *adjudication* has taken place,[18] a permit may be issued and water rights established "in conformity with both the law and the overall *water use* policy of the states" (App. 18a; emphasis added), and that "* * * Wyoming does not, as [Utah] has argued, have the sole jurisdiction to adjudicate the water right in issue" (*id.*). However, by then adding that "Wyoming is the state of diversion for the appropriation sought by both parties, thus mandating the application of Wyoming law in any adjudica-

[18] As Utah admits, no such "adjudication" or the award of permits has yet taken place. See Utah's October 16, 1975, Memo, *supra* n. 12, at p. 17; Utah's October 26, 1981, Brief, *supra* n. 4, at pp. 14-16.

tion * * *" (App. 18a-19a), and "[t]he Montana courts are perfectly able to apply the law of Wyoming" in the course of the proceedings pending before the Montana District Court (App. 19a), the Federal court appeared to give credence to Utah's position, thus ignoring, in Petitioner's view, the mandate of Article XVIII.

The State District Court then dissolved its stay (App. 23a) and proceeded to rule upon Petitioner's pending Writ of Mandate. It quashed and dismissed the Writ not because there were alternative remedies at law available, but because "the action of [Montana water officials] is in direct accord with the Yellowstone River Compact * * *" (App. 46a). In so ruling, the court relied upon a number of cases involving compacts or statutes that did not contain provisions comparable to Article XVIII (App. 36a-38a). As to that Article, the court adopted the language favorable to Utah quoted above from the Federal District Court's opinion (App. 41a). The State court appeared to attempt to distinguish between control over water apportioned to a State and control over water once that water has physically reached the border of the State (*id.*). The State District Court entered a judgment dismissing Petitioner's Writ of Mandate with prejudice but without prejudice to any other remedy available (App. 47a).

On appeal, the Montana Supreme Court affirmed (App. 49a). Although the court took note of Article XVIII (App. 55a-56a), it did not discuss its meaning or attempt to reconcile other Articles in the Compact with the terms of Article XVIII. Instead, after setting forth a shorthand expression of each side's position, the court simply concluded that under Article VII(C), since Wyoming was the State of diversion, Montana water officials "correctly assigned the November 20, 1973, priority date to Utah in conformity with Wyoming law as required by the Compact" (App. 57a).

Thus, in a case in which Petitioner has never received a factual hearing or adjudication,[14] in which the allegations of its Amended Affidavit were supposed to have been accepted as true for purposes of a ruling upon Petitioner's Writ,[15] and in which the State courts were theoretically deciding only whether mandamus would lie, those courts in fact have ignored certain facts in the Amended Affidavit and have proceeded finally to pass upon the critical provisions of the Compact, thus foreclosing Petitioner from any other remedy[16] in regard to the Compact, at law or otherwise, except certiorari in this Court.[17]

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[14] Petitioner repeatedly pointed out the denial of its right to an evidentiary hearing and the reliance of the State courts upon facts not in evidence or contrary to those in the Amended Affidavit. *E.g.*, Intake's September 25, 1981, Initial Brief, *supra* n. 1, at pp. 12, 14-15; Intake's February 12, 1982, Reply Brief, *supra* n. 1, at pp. 2, 8, 9, 12, 14-15; Intake's April 23, 1982, Petition for Rehearing, *supra* n. 1, at pp. 5-6, 10-11, 18.

[15] Not only did Intake argue this, but Respondents conceded it. Intake's December 30, 1980, Brief and Memo, *supra* n. 1, at p. 5; Respondents' December 18, 1981, Brief, *supra* n. 4, at p. 9.

[16] Intake's April 23, 1982, Petition for Rehearing, *supra* n. 1, at p. 6; *cf. Sporhase* v. *Nebraska ex rel. Douglas*, 50 U.S.L.W. 5115, 5116 n. 2 (U.S. July 2, 1982).

[17] The Montana Supreme Court added to its opinion what would appear on the surface to be an alternative, State-law holding. It ruled that Intake could not even prevail under Montana law, because Utah had up to 18 months to correct a defective filing, and Utah filed the appropriate Montana forms within that period (App. 57a). Upon closer inspection, however, it is clear that this conclusion is premised upon the concept that Montana was required under the Compact to give effect to the Wyoming priority date, if properly filed in Montana. This is borne out by the next succeeding sentence in the opinion: The Montana water officials "correctly assigned Utah the priority date of *its first filing* [in Wyoming]" (*id.*; emphasis added).

Thus, if this Court were to hold that Montana was not duty bound to give effect to the Wyoming filing, the question of whether or not Utah corrected its papers in Montana would become irrele-

REASONS FOR GRANTING THE WRIT

1. The Importance of the Issues.

The outcome of this case is of importance, of course, to the two competing companies whose multi-million dollar projects are at stake.[18] More importantly, the outcome will affect many thousands of citizens who will receive direct benefits, or be deprived of them, depending upon which project is able to obtain the water at issue. These are not only the people of Montana, Wyoming and North Dakota, but the residents of other States of this Nation as well.

Petitioner is a water company organized for the purpose of selling, renting and distributing water to customers for industrial, municipal and irrigation purposes. Petitioner's application seeks to appropriate all of the unappropriated and surplus waters of the Powder River. Its project is a multi-purpose one, whose benefits will accrue over a wide region, as distinguished from Utah's, which is a single-purpose project to provide water for a coal gasification facility. The area in which the Yellowstone River and its tributaries are located—which is part of the area impacted by Petitioner's Project—is an arid one even by Western standards. It includes vast irrigable or irrigated lands. It is a region in which the largest single coal deposits in the United States—the Powder

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vant, because Montana would then be free to apply its own "first in time, first in right" priority dates without regard to what Utah did in Wyoming.

[18] As previously mentioned, the cost to Petitioner for its project was originally estimated to be $35,700,000 (Intake's April 4, 1980, Memo, *supra* n. 1, at Ex. 6). If it is granted a permit, it will have to make at least a $288,500 payment to Montana authorities for an Environmental Impact Statement (*id.*). The original estimated cost to Utah of its project is $38,000,000, and it will have to make at least a $300,000 payment if its permit is granted (*id.* at Ex. 7). Presumably, all of these figures have increased since they were originally estimated.

River Basin coal deposits—are located. Water is critical to the development and use of these lands for irrigation purposes. Water is equally essential, if not more so, from the standpoint of development of the energy resources to be found in the area, for which the Powder River is the only reasonably accessible water supply available to achieve these goals.

Thus, it is vitally important to have a definitive decision from this Court interpreting Article XVIII of the Yellowstone River Compact in conjunction with the Compact's other Articles. Such a decision is needed *now*, for present application in the signatory States. But it is also important for the future, because while Article XVIII is a new provision, heretofore not included in other interstate compacts, it undoubtedly will become more and more of a fixture in the years ahead. It is thus a matter of some urgency for all of the Western States to understand the dimensions and implications of such a provision before they enact it into new compacts—particularly when those compacts may well supersede, take precedence over, or effectively amend their own State constitutions and statutes.

Article XVIII is an attempt to preserve to each individual State the application of its own law to the extent that water is apportioned to that State. The Montana Supreme Court's ruling goes in precisely the opposite direction. It decrees, for a State which has had water apportioned to it under the Compact, a mandatory deference to the laws of *other* States. Only this Court can realign this juxtaposition of requirements and make clear in what respect the law of each State controls. This realignment takes on particular significance when the subject matter is water, for as this Court has often noted,[19] water and its allocation are the life-blood of the West.

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[19] See, *e.g.*, most recently, *Sporhase* v. *Nebraska ex rel. Douglas*, *supra*, 50 U.S.L.W. at 5118.

It is no overstatement, therefore, to predict that this Court's determination of what an Article XVIII is intended to bring about will have an impact upon citizens in all our States throughout the years to come.

2. The Decision Below Was Wrong.

As the Montana Supreme Court correctly pointed out, an interstate compact approved by Congress takes precedence over State law. It is, absent a violation of the United States Constitution, the supreme law of the land and, as such, is subject to final interpretation by this Court. *Hinderlider* v. *LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 102-107 (1938); *Dyer* v. *Sims*, 341 U.S. 22, 28 (1950); *Petty* v. *Tennessee-Missouri Bridge Com'n*, 359 U.S. 275, 278 (1959); see *Sporhase* v. *Nebraska ex rel. Douglas*, *supra*, 50 U.S.L.W. at 5118, 5120.

Nevertheless, Petitioner has been frustrated throughout the proceedings below by Respondents' refusal to discuss Article XVIII of the Yellowstone River Compact at all,[20] or by their brief references to it without any cogent attempt to reconcile the other provisions of the Compact with Article XVIII.[21] The State District Court and the

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[20] "Reply Memorandum on Behalf of Utah International, Inc. in Support of Motions to Quash and Dismiss," filed June 11, 1975 (hereinafter "Utah's June 11, 1975, Reply"); Respondents' June 30, 1980, Memo, *supra* n. 4; Respondents' December 10, 1980, Supp. Memo, *supra* n. 4; Respondents' December 18, 1981, Brief, *supra* n. 4 (main, 31-page brief before Montana Supreme Court).

[21] "Defendants' Reply to Plaintiff's Memorandum in Opposition to Motions to Quash and Dismiss," filed June 9, 1975, at p. 9; Respondents' October 16, 1975, Memo, *supra* n. 9, at pp. 10-11; Utah's October 16, 1975, Memo, *supra* n. 12, at p. 13; Utah's June 30, 1980, Brief, *supra* n. 4, at pp. 13, 20; "Department of Natural Resources and Conservation (Defendants) Supplemental Memorandum in Support of Motions to Quash the Alternative Writ of Mandate and Dismiss the Amended Affidavit for Writ of Mandate", filed December 31, 1981,. at pp. 1-2; Utah's October 26, 1981, Brief,

Montana Supreme Court followed the same lead—referring to Article XVIII but then failing to interpret or apply the Article's mandate (App. 41a-42a, 55a-56a). We suggest that the reason for this cavalier treatment is due to a failure to reconcile the views of the Compact advanced by Respondents and adopted by Montana's highest court with the mandate of Article XVIII.

The Montana Supreme Court looked to only one of the Compact's provisions, Article VII(C), for a resolution of the parties' differences. That provision reads:

> (C) Appropriations may hereafter be adjudicated in the state in which the water is diverted, and where a portion or all of the lands irrigated are in another signatory state, such adjudications shall be confirmed in that state by the proper authority. Each adjudication is to conform with the laws of the state where the water is diverted and shall be recorded in the county and state where the water is used. [App. 69a.]

The court, without elaboration, proceeded directly from this language to the conclusion that since Wyoming is the State of diversion in this case, Montana water officials correctly assigned Utah's Wyoming priority date to Utah's application in Montana (App. 57a), thus effectively preempting Petitioner's Montana priority date. The court ignored the fact that no adjudications have actually been made in either State. It further ignored the fact that by the use of the word "may", the Article does not require that appropriations be adjudicated in the State where the water is diverted. Even more to the point, the court gave no effect to the provisions of Article XVIII:

> No sentence, phrase, or clause in this compact or in any provision thereof shall be construed or in-

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supra n. 4, at pp. 46-47, 48; Montana's April 30, 1982, Obj., *supra* n. 4, at pp. 9-10, 12; Utah's April 30, 1982, Obj's., *supra* n. 4, at pp. 8-9.

terpreted to divest any signatory state or any of the agencies or officers of such states of the jurisdiction of the water of each state as apportioned in this compact. [App. 72a.]

There is no question but that the waters sought by both competing companies are those apportioned to Montana under the Compact, and the competing water is intended for beneficial use in Montana by both companies (see *supra* pp. 4-5, 6).[22] The plain language of Article XVIII, therefore, can have no other meaning but that as to this particular water, Montana has jurisdiction to assign its own priority date to filings in that State and need not defer to the priority jurisdiction of any other State.

The key question thus becomes: How can the appropriation of Utah, if granted, be a Wyoming right with a priority assigned under Wyoming law, if the waters which are the subject matter of the appropriation are to be charged against the allocation of water to Montana under the Yellowstone River Compact, and such waters are to be used in Montana? If Wyoming law were to control the priority date of appropriation of any waters of the Powder River diverted in Wyoming but allocated to Montana, there would never be any necessity for filing an application for a beneficial water use permit in Montana under Montana law with respect to such waters, as all parties agree must be done.

Respondents have argued that by requiring the State's own permit, Montana can insure that water counted against its allocation is wisely and beneficially used *within its own borders* (Respondents' June 30, 1980, Memo,

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[22] Utah has conceded, for example, that its application, if granted, will apply to water charged against *Montana's* allocation under the Compact (Utah's May 8, 1975, Memo, *supra* n. 4, at pp. 17-18), and that the water it seeks is to be used in Montana and has been allocated to Montana (Utah's October 26, 1981, Brief, *supra* n. 4, at pp. 2-4, 25; see also *supra* n. 3).

supra n.4, at p. 15). But one must ask how Montana can accomplish this task if a Wyoming priority has already effectively determined how such water will be used in Montana. Conversely, the enforcement of a Wyoming priority will prohibit what may well be the most wise and beneficial use of the water within Montana—namely, the use to which Petitioner proposes to put the water in its own project. And as to Utah's project, would Montana be free to stop the water at its border's edge on the ground that Utah's contemplated use was neither wise nor beneficial for Montana?

We submit that Article VII(C), in providing that each adjudication shall conform to the laws of the State of diversion and be recorded in the County and State where the water is to be used, merely means that the State of diversion is to make a determination under its own laws that the appropriation will not cause injury to the appropriators of that State, in that the reservoir site, diversion works, aqueduct and all other aspects pertinent to such diversion are in the best interests of the appropriators of that State. The adjudication to this effect is then to be recorded in the County and State of use for the information of any interested parties. On the other hand, under Article XVIII, Montana is awarded absolute and controlling authority over water apportioned to it by the Compact, and Montana law should then be applied to determine whether Montana wants this particular water used in the State and debited against Montana's apportionment of water under the Compact. This interpretation comports with the concept that the law of the state of *use* should determine the date of priority of an appropriation which is the subject matter of any adjudication where the waters involved are allocated to the State of use under a compact.

It is difficult to understand how Utah can admit that Montana law controls all priorities as to water which

reaches Montana,[23] and yet assert that Montana has no control over water which has already been apportioned and allocated to, and which is destined for beneficial use within, that State. Utah's position would make sense as to water which is allocated to the *diverting* State, because that State obviously would have the primary interest in protecting both its own allocation and the use to which the water is to be put. But a State which has relatively little interest in the water except to divert it is more like a stakeholder, or the cutodian of an escrow account;[24] its interest in the water is minimal when compared with that of the ultimate "owner" and user of the water.[25]

In its effort to justify the rulings below, Utah has made two totally inconsistent arguments. On the one hand, it has contended that Wyoming law controls, and that Montana officials need only have routinely processed copies of what had already been filed in Wyoming. On the other hand, Utah's position has been that Montana water officials in effect treated Utah's original filing in Montana as defective and took the necessary steps to see that corrections were made in the time provided for under the Montana statute (*cf.*, *e.g.*, Utah's October 26, 1981, Brief, *supra* n.4, at pp. 1-21, with *id.* at pp. 22-29). These conflicting arguments illustrate the problem

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[23] *E.g.*, Utah's June 11, 1975, Reply, *supra* n. 20, at p. 14.

[24] Wyoming can, of course, make sure that Montana appropriators will not injure Wyoming appropriators, but once that decision is reached, Montana law governs as to how its 58% allocation can be appropriated, if at all.

[25] In this respect, it is noteworthy that under Article I(A) of the Compact, all entities and individuals, including corporations, which use, claim, or in any manner assert any right to the use of the waters of the Yellowstone River Basin under the authority of the signatory States are to be treated as States under the Compact (App. 61a) (see Utah's October 16, 1975, Memo, *supra* n. 12, at pp. 11, 13).

Respondents have had in attempting to interpret the Compact.

Despite the obvious need to deal in some fashion with Article XVIII, and despite Respondents' initial feeling that the Compact was not entirely clear (see *supra* n.10), the Montana Supreme Court has approached the problem here in a singularly simplistic way, by ignoring Article XVIII and relying upon one sentence in Article VII(C). This is the same court which had previously noted: "It often happens that the chief value of an appropriation consists in its priority over other appropriations in the same natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right." *General Agriculture Corp.* v. *Moore*, 166 Mont. 510, 534 P.2d 859, 863 (1975).

Despite this clear recognition of the important rights involved here, the Montana Supreme Court definitively ruled upon the Yellowstone River Compact without Petitioner ever having received an evidentiary hearing. No evidence has been presented or received by any court, and many of the allegations in Petitioner's Amended Affidavit which were supposed to have been taken as true have been ignored or in effect rebutted by conclusions in the rulings below. The net result is that despite Petitioners' repeated protests against violations of its procedural and substantive rights (*supra* n.14), the Compact has now been interpreted in a way that forecloses any further action on Petitioner's part if a permit issues on Utah's application. The State District Court judgment that purported to leave open any remedy available to Petitioner except mandamus has been followed by a decision of the State's highest court which cuts off all such remedies. No matter what Petitioner now chooses to allege in State court, it will be met by the holding that the Montana water officials did precisely what the Compact required them to do.

We respectfully submit that no matter which party to this litigation is correct in its attempt to reconcile the

various provisions of the Compact, this Court should have the final word in the matter. Otherwise, Article XVIII, with its new and important language in regard to water rights, will go uninterpreted, and Western States in the future will be at a loss as to whether or not they can safely include such language in their interstate compacts.

As to Montana, we are confident that once that State is made to understand by this Court that the Yellowstone River Compact does not *require* the retroactive application by Montana of Wyoming's priority dates, Montana will proceed to apply its own "first in time, first in right" law of priorities, and Petitioner's September 27, 1974, date will then prevail.

CONCLUSION

For all of the reasons outlined above, we urge the Court to grant certiorari, to interpret the controlling provisions of the Yellowstone River Compact, and to reverse the decision and judgment of the Montana Supreme Court.

Respectfully submitted,

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